

1 MARTIN A. MUCKLEROY, ESQ.

2 Nevada Bar No. 009634

3 MUCKLEROY LUNT, LLC

4 6077 S. Fort Apache, Ste 140F

5 Las Vegas, NV 89148

6 Phone: (702) 907-0097

7 Direct: (702) 534-6272

8 Fax: (702) 938-4065

9 martin@muckleroylunt.com

10 *Attorneys for Plaintiff*

11 (Additional Counsel on Signature Page)

12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**

14 THEODORUS STROUS, in his capacity as
15 a shareholder of SCIO DIAMOND
16 TECHNOLOGY CORP. brings this action
17 derivatively on behalf of SCIO DIAMOND
18 TECHNOLOGY CORP., and as a Class
19 Action on behalf of himself and all other
20 Adamas shareholders who are similarly
21 situated

22 Plaintiff,

23 v.

24 BERNARD MCPHEELY, KARL
25 LEAVERTON, GERALD MCGUIRE,
26 LEWIS SMOAK, ADAMAS ONE CORP.
27 and JOHN G. GRDINA

28 Defendants,

and

SCIO DIAMOND TECHNOLOGY CORP.,

Nominal Defendant.

Case No. 2:22-cv-00256-CDS-EJY

**PLAINTIFF'S SUPPLEMENTAL BRIEF
PURSUANT TO JUNE 14, 2024, ORDER**

PLAINTIFF HAS VOLUNTARILY DISMISSED ALL OF THE CLAIMS

In light of the fact that the Scio Individual Defendants abandoned Scio before the initial complaint was filed, on first blush the Ninth Circuit’s decision in *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1237 (9th Cir. 2008), would seem to weigh in favor of realignment of Scio as a party plaintiff. However, this is an unusual case and *Digimarc* instructs that “a court may consider not only the ‘face of the pleadings’ but ‘the nature of the controversy.’ This is especially important in cases where, as here, the corporation has not yet answered the plaintiffs’ complaint.” *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1235–36 (9th Cir. 2008) (*internal citations deleted*) (*citing Smith v. Sperling*, 354 U.S. 91, 96 (1957)).

At its core, the Verified Second Amended Stockholder Derivative Complaint and Class Action Complaint [ECF 26] (“Complaint”) alleges that the individual defendants conspired to reduce the sales price Adamas paid for Scio’s assets by 100,000 shares of Adamas common stock ***five months after the Scio asset purchase transaction closed***; concealed this from Scio’s shareholders (now also Adamas shareholders) for over two years; failed to ensure that the remaining 800,000 Adamas shares were delivered, *pro rata*, to Scio’s shareholders; and failed to even inform Scio’s shareholders who had possession, custody and/or control of the 800,000 Adamas shares. Worse, Scio’s directors abandoned the company without protecting the 800,000 Adamas shares by placing them in a trust or by dissolving Scio and distributing them *pro rata* to Scio’s shareholders as required by Nevada law.¹ The Adamas shares now appear to be in limbo as Scio has no way, given its current status, to distribute or deliver them *pro rata* to its own shareholders.

¹ This course of conduct, apparently designed to “immunize” the Scio Individual Defendants “from suit while simultaneously making it impossible for the company itself to sue to recover the assets,” warranted the Delaware Chancery Court in a similar case to reject the defendant officers’ and directors’ Rule 23.1 demand defense in *In re Puda Coal, Inc. S’holders Litig.*, C.A. No. 6476–CS (Del. Ch. Feb. 6, 2013) [attached as Exhibit 1 to ECF 36-1].

1 Importantly, the Ninth Circuit has made clear that it “will ignore the citizenship of ‘nominal
2 or formal parties who have no interest in the action,’ and are ‘merely joined to perform the
3 ministerial act of conveying the title if adjudged to the complainant.’” *Prudential Real Est.*
4 *Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 873 (9th Cir. 2000) (*citing* 13B Charles Alan
5 Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 3606, at 409 & n.
6 2 (2d ed.1984) (*quoting* *Walden v. Skinner*, 101 U.S. 577, 588–89, (1879) and *Matchett v. Wold*,
7 818 F.2d 574, 576 (7th Cir.1987) (“The addition to a lawsuit of a purely nominal party-the holder
8 of the stakes of the dispute between the plaintiff and the original defendant-does not affect diversity
9 jurisdiction.”)).

11 As Scio apparently remains in possession or control of 800,000 shares of Adamas stock, its
12 primary trustee-like function – the distribution and delivery of Scio’s remaining assets (e.g., the
13 Adamas shares) pursuant to an orderly dissolution -- is nearly identical to the trustee-like function
14 of several of the defendants in *Prudential*, which the court there refused to realign to defeat
15 diversity jurisdiction. *Prudential*, 204 F.3d at 873–74 (the “interests of Sosso, Croushore, and PPR
16 in this suit will be those of mere stakeholders charged with delivering the stock to the prevailing
17 party). In addition, because Scio’s primary remaining function is ultimately to dissolve and
18 distribute the Adamas shares *pro rata* to all of Scio’s shareholders, this is “antagonistic” to Plaintiff
19 (and other Scio shareholders) because Scio would be distributing some of those shares to the Scio
20 Individual Defendants who should not receive any further benefit given their alleged fiduciary
21 breaches. Thus, Scio was properly named as a nominal defendant in the context of this litigation,
22 notwithstanding the derivative nature of several of Plaintiff’s claims.
23
24
25
26
27
28

Regardless, to avoid the potential for piecemeal litigation², Plaintiff voluntarily dismissed *all* claims in the above-captioned action, as follows:

- a Stipulation of Dismissal of Counts I & II, jointly filed with the Scio Individual Defendants pursuant to Fed.R.Civ.P. 41.(A)(1)(ii) [ECF 44]; and
- a Notice of Dismissal pursuant to Fed.R.Civ.P. 41.(A)(1)(i) [ECF 45] of Counts III, IV & V, concerning the Adamas Defendants.³

With these dismissals, both the Individual Scio Defendants' Motion to Dismiss [ECF 28] and the Adamas Defendants' Motion to Dismiss [ECF 30] are now moot and should be denied as such.

CONCLUSION

In light of Plaintiff's voluntary dismissal of *all* of the claims in this action, Plaintiff respectfully requests that this Court deny the pending motions to dismiss as moot and direct the Clerk to close the case.

Dated: June 28, 2024

Respectfully submitted,

/s/ Martin A Muckleroy

Martin A. Muckleroy
State Bar #9634
MUCKLERoy LUNT, LLC
6077 S. Fort Apache Rd., Ste 140
Las Vegas, NV 89148
Telephone: 702-907-0097
Facsimile: 702-938-4065
Email: martin@muckleroylunt.com

² In the event the Court realigned Scio as a party-plaintiff and dismissed Plaintiff's derivative claims for lack of complete diversity, that would still leave Plaintiff's stand-alone class action claim against the Adamas Defendants (Count III) because there is complete diversity as between Plaintiff and the Adamas Defendants. This could lead to piecemeal litigation and/or the absence of critical parties.

³ Plaintiff's Notice of Dismissal is timely since none of the defendants have filed an answer or a motion for summary judgment. *Hamilton v. Shearson-Lehman American Exp., Inc.*, 813 F.2d 1532 (9th Cir. 1987) (strictly construing Rule 41(A)(1)(i) as permitting a voluntary dismissal of claims provided the defendant has not filed either an "answer" to the complaint or a "summary judgment" motion).

EVANGELISTA WORLEY, LLC

James Evangelista
10 Glenlake Parkway
South Tower Suite 130
Atlanta, GA 30328
Telephone: 404-205-8400
Facsimile: 404-205-8395
jim@ewlawllc.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2024, I personally served a true and correct copy of the foregoing **PLAINTIFF'S SUPPLEMENTAL BRIEFING PURSUANT TO JUNE 14, 2024, ORDER** on all parties by causing a true and correct copy to be filed with the court's CM/ECF system, which should automatically send a copy to all counsel of record.

Dated: June 28, 2024

/s/ Martin A Muckleroy

Martin A. Muckleroy

State Bar #9634

MUCKLEROY LUNT, LLC

6077 S. Fort Apache Rd., Ste 140

Las Vegas, NV 89148

Telephone: 702-907-0097

Facsimile: 702-938-4065

Email: martin@muckleroylunt.com